No. 96-110

(3)

In The

Supreme Court of the United States

October Term, 1995

STATE OF WASHINGTON, and CHRISTINE GREGOIRE, Attorney General of the State of Washington,

Petitioners,

v.

HAROLD GLUCKSBERG, M.D., ABIGAIL HALPERIN, M.D., THOMAS A. PRESTON, M.D., and PETER SHALIT, M.D., Ph.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, COLORADO, FLORIDA, GEORGIA, IOWA, MARYLAND, MICHIGAN, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VIRGINIA AND COMMONWEALTH OF PUERTO RICO AND TERRITORY OF AMERICAN SAMOA IN SUPPORT OF PETITIONERS STATE OF WASHINGTON, ET AL.

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QUESTIONS PRESENTED FOR REVIEW

Whether there is a liberty interest under the Due Process Clause of the Fourteenth Amendment to commit suicide and, if so, whether it includes an interest to receive the assistance of another to do so?

Whether, balancing asserted interests in suicide and assisted suicide against relevant state interests, respondent's constitutional rights are violated by Washington's absolute prohibition of assisted suicide?

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I. INTEREST OF THE AMICI CURIAE

For over two centuries, federalism has stood as the cornerstone of our republican form of government. Indeed, as this Court has declared, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 799, 725 (1869). Respect for state sovereignty and the power of the people to directly govern their own affairs, unless excluded by the Constitution or valid Act of Congress, is the embodiment of our federalism.[1] It is this understanding of federalism which ensured ratification of the Constitution and, until the case below, safeguarded the essential role of the States in our federal system.

In the history of our Nation, no court of final jurisdiction has ever declared the existence of a constitutional right or interest to commit suicide or assisted suicide.[2] However, in a radical departure from our Nation's history and tradition, and contrary to the laws of a majority of States, the Ninth Circuit has announced its discovery of new rights to commit suicide and assisted suicide imbedded in the Due Process Clause of the Fourteenth Amendment.[3] The Ninth Circuit's holding

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[1] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U.S. Const. amend. X.

[2] The Second Circuit has rejected the claim that there is a liberty interest in assisted suicide under the Due Process Clause of the Fourteenth Amendment. *Quill v. Vacco*, 80 F.3d 716, 723-725 (2d Cir. 1996) (hereinafter "*Quill*"). The Second Circuit did, however, invalidate New York's prohibition of assisted suicide on equal protection grounds. *Quill*, 80 F.3d at 725-731. On May 16, 1996, a petition for certiorari was filed by Dennis C. Vacco, Attorney General of the State of New York, *et al.*, seeking review of the Second Circuit's opinion in the *Quill* case.

[3] *Compassion in Dying v. State of Washington*, 79 F.3d 790, 793-794 (9th Cir. 1996) (*en banc*) (hereinafter "*Compassion in Dying II*"). A limited eleven-judge *en banc* panel vacated the previous decision of the three-

strikes at the very heart of this Court's federalism jurisprudence and, upon review, falls far short of overcoming the "great resistance" to expansion of the substantive content of the Due Process Clause.[4] *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986). The Ninth Circuit's opinion also "calls for some judgment about the limits of the [Judiciary's] role in carrying out its constitutional mandate." *Bowers*, 478 U.S. at 190.

If allowed to stand, the Ninth Circuit's opinion will precipitate a fundamental change in the long-standing policies of a majority of States to prevent suicide and assisted suicide. "[A]ll states provide for the involuntary commitment of persons who may harm themselves as the result of mental illness, and a number of states allow the use of nondeadly force to thwart suicide attempts." *People v. Kevorkian*, 447 Mich. 436, 479, 527 N.W.2d 714, 732 (1994) (footnotes omitted), *cert. denied*, 115 S.Ct. 1795 (1995). A majority of States impose criminal penalties on those who assist another to commit suicide.

At stake in this case are, first and foremost, the lives of the people, both those who wish to die and those who wish to live no matter what their circumstances. Also at stake is the sovereign power of the States to protect and preserve those lives *without* a federal requirement that the State "make judgments about the 'quality' of life that a particular individual may enjoy, . . . " *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 282 (1990). The resolution of this

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judge panel, reported at *Compassion in Dying v. State of Washington*, 49 F.3d 586 (9th Cir. 1995) (hereinafter "*Compassion in Dying I*"), which had voted 2-1 to reverse the district court decision, reported at 850 F.Supp. 1454 (W.D. Wash. 1994). Thereafter, an active judge *sua sponte* requested that the full court *en banc* rehear the case, however, that request failed to receive a majority of the votes of the non-recused active judges and was rejected. Dissenting opinions from the order rejecting the request for rehearing were filed by Circuit Judges O'Scannlain and Trott. *Compassion in Dying v. State of Washington*, 85 F.3d 1440 (9th Cir. 1996).

[4] Unless otherwise noted, the term "Due Process Clause" as used herein refers to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

question will arguably affect more lives than any case which this Court will confront in the foreseeable future. It will also determine whether "the States *as States* have [any] legitimate interests which the National Government is bound to respect even though its laws are supreme." *Garcia v. San Antonio Metro.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (italics original, citation omitted, insert added).

II. REASONS FOR GRANTING THE WRIT

Perhaps the best evidence of the extent of the Ninth Circuit's departure from our Nation's historical and traditional treatment of suicide and assisted suicide is the number of conflicts created by the decision. In *Compassion in Dying II*, the Ninth Circuit announced its discovery of a new "constitutionally-protected liberty interest in determining the time and manner of one's own death . . . " *Compassion in Dying II*, 79 F.3d at 793. That decision is in direct conflict with the Second Circuit's recent holding in *Quill v. Vacco* that:

> "The right to assisted suicide finds no cognizable basis in the Constitution's language or design, even in the very limited cases of those competent persons who, in the final stages of terminal illness, seek the right to hasten death. We therefore decline the plaintiffs' invitation to identify a new fundamental right, in the absence of a clear direction from the Court whose precedents we are bound to follow." *Quill*, 80 F.3d at 724-725.

The Ninth Circuit's opinion also squarely conflicts with the recent decision of the Michigan Supreme Court in *People v. Kevorkian* where, on the identical substantive due process issue, the Court held that:

> "On the basis of the foregoing analysis, we would hold that the right to commit suicide is neither implicit in the concept of ordered liberty nor deeply rooted in this nation's history and tradition. It would be an impermissibly radical departure from existing tradition, and from the principles that underlie that tradition, to declare that there is such a

fundamental right protected by the Due Process Clause."[5]

Like its holding, the rationale utilized by the Ninth Circuit also creates numerous conflicts. In *Compassion in Dying II*, the Ninth Circuit found no difference between the withdrawal of life support, on the one hand, and the act of suicide, on the other. *Compassion in Dying II*, 79 F.3d at 821-824. However, "those courts that have found a right to refuse to begin or to continue life-sustaining medical treatment have done so only after concluding that such refusal is wholly different from the act of suicide."[6] Numerous state legislatures have likewise recognized this fundamental distinction.[7]

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[5] *People v. Kevorkian*, 447 Mich. 436, 481, 527 N.W.2d 714, 733 (1994), *cert. denied*, 115 S.Ct. 1795 (1995). The Ninth Circuit's opinion also conflicts with the holding of the California Court of Appeals in *Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1619-1623, 4 Cal.Rptr.2d 59, 61-64 (1992), wherein the court considered whether a terminally ill individual's constitutional rights to privacy and to refuse medical treatment under the United States and California Constitutions included a right to an assisted suicide. After balancing Donaldson's interests against those of the State, the court concluded that he had "no constitutional right to a state-assisted death." *Donaldson*, 2 Cal.App.4th at 1623. While the court in *Donaldson* considered whether a right to an assisted suicide was encompassed by a generalized constitutional right of privacy, like the issue in *Cruzan*, "this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279 n.7 (1990).

[6] *People v. Kevorkian*, 447 Mich. 436, 480, 527 N.W.2d 714, 732 (1994) (footnote omitted), *cert. denied*, 115 S.Ct. 1795 (1995). *See, e.g., Von Holden v. Chapman*, 87 A.D.2d 66, 450 N.Y.S.2d 623, 627 (1982) ("essential dissimilarity" between right to decline medical treatment and any right to end one's life); *In re Conroy*, 98 N.J. 321, 351, 486 A.2d 1209, 1224 (1985); *Bouvia v. Superior Court*, 179 Cal.App.3d 1127, 1145, 225 Cal.Rptr. 297, 306 (1986); *Bartling v. Superior Court*, 163 Cal.App.3d 186, 196, 209 Cal.Rptr. 220, 225-226 (1984); *People v. Adams*, 216 Cal.App.3d 1431, 1440, 265 Cal.Rptr. 568, 573-574 (1990); *Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1619-1623, 4 Cal.Rptr.2d 59, 61-64 (1992) and cases cited therein; *Thor v. Superior Court*, 5 Cal.4th 725, 742, 21 Cal.Rptr.2d 357, 367-368 (1993); *DeGrella v. Elston*, 858 S.W.2d 698, 706-707 (Ky. 1993). *Cf. In re Quinlan*, 70 N.J. 10, 51-52 and n.9, 355 A.2d 647, 669-670 and n.9 (neither attempted nor aiding suicide implicated in circumstances similar to those presented), *cert. denied*, 429 U.S. 922 (1976). *See also* Thomas J. Marzen, et al., *Suicide: A Constitutional Right?*, 24 Duq. L. Rev. 1, 10 n.34 (1985), and cases cited therein.

Finally, in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), this Court "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition" but, at the same time, recognized Missouri's important interest in the protection and preservation of human life, noting that "the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." *Cruzan*, 497 U.S. at 279-280 (footnote omitted, insert added). As Circuit Judge Noonan, writing for the majority in *Compassion in Dying I*, astutely observed, "[w]hatever difficulty the district court [and, likewise, the *en banc* panel] experienced in distinguishing one situation from the other, it was not experienced by the majority in *Cruzan*." *Compassion in Dying I*, 49 F.3d 586, 591 (9th Cir. 1995) (insert added), *superseded by* 79 F.3d 790 (9th Cir. 1996). These conflicts, involving an issue of such exceptional and profound nationwide importance, can only be resolved – indeed, must be resolved – by the final authoritative voice of this Court.

A. Certiorari Should be Granted to Establish That There is No Liberty Interest Under The Due Process Clause of the Fourteenth Amendment To Commit Suicide or To Receive The Assistance of Another To Do So

The issue presented in this case is whether there is a liberty interest under the Due Process Clause of the Fourteenth Amendment to commit suicide and, if so, whether it includes an interest to receive the assistance of another to do

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[7] *See* Thomas J. Marzen, *"Out, Out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill*, 21 Hastings Constitutional Law Quarterly, No. 3, 799, 806 n.25 (1994) ("legislatures that have codified the right to refuse treatment in the same legislation reject any affirmative act to end life."), *citing* natural death/living will statutes of forty States.

so. Resolution of this issue, like all substantive due process adjudication, must begin with the cautionary note expressed by this Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986):

> "Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. . . . " *Bowers*, 478 U.S. at 194-195.

This Court recently reaffirmed that "great resistance" in *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992), declaring that "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. [citation omitted]" Mindful of that "great resistance", it is of critical importance that lower courts carefully adhere to the principles established by this Court when construing the substantive content of the Due Process Clause. Unfortunately, the Ninth Circuit failed in this regard. Certiorari should be granted to overrule *Compassion in Dying II* and, equally important, to reaffirm those principles, established by this Court, which govern substantive due process adjudication.

1. The Constitutional Analysis Utilized by the Ninth Circuit in *Compassion in Dying II* was Fundamentally Flawed

In the perilous waters of substantive due process adjudication, a carefully focused approach helps to eliminate the irrelevant, illuminate the pertinent, and insure that the discovery of new rights is "much more than the imposition of the Justices' own choice of values on the States and Federal Government, . . . ". *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). Indeed, this Court has made clear that " '[s]ubstantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (further citation omitted). Thus, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), this Court carefully focused on the specific conduct at issue when it framed the question presented as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . " *Bowers*, 478 U.S. at 190. The focus of the Court's inquiry was not whether one has a right to engage in sexual conduct of one's choice but, rather, whether the specific conduct at issue, *i.e.*, homosexual sodomy, was entitled to constitutional protection. Likewise, in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), this Court carefully focused on whether Nancy Cruzan had "a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment from her under [her] circumstances." *Cruzan*, 497 U.S. at 269 (insert added). This carefully focused approach allowed the Court to first identify the specific conduct at issue (*i.e.*, the withdrawal or withholding of unwanted medical treatment), and then the relevant historical traditions (*i.e.*, the doctrines of informed consent and bodily integrity) protecting or denying protection to that conduct. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 127-128 n.6 (1989) (Scalia, J.).

Rather than carefully focusing on suicide and assisted suicide, the Ninth Circuit broadly framed the question presented as "whether there is a liberty interest in determining

the time and manner of one's death." *Compassion in Dying II*, 79 F.3d at 800. By doing so, it opened the door to consideration of a host of activities which are wholly dissimilar from suicide and which plainly involve different considerations. Indeed, even the Ninth Circuit acknowledged that "[t]he liberty interest we examine encompasses a whole range of acts that are generally not considered to constitute 'suicide.'" *Compassion in Dying II*, 79 F.3d at 802.

In sharp contrast to the Ninth Circuit's broad approach, other courts which have considered this identical question have utilized a carefully focused approach consistent with the precedents of this Court.[8] The Ninth Circuit's rationale for broadly framing the question presented was its belief that "it is the end and not the means that defines the liberty interest." *Compassion in Dying II*, 79 F.3d at 801. If true, however, the issues framed by this Court in both *Bowers* and *Cruzan* were far too narrow. Rather, under the Ninth Circuit's new "end-result" standard for defining liberty interests, the issue in *Bowers* should have been whether there is a "liberty interest in sexual pleasure" and, in *Cruzan*, whether there is a "liberty interest to determine the time and manner of one's death." Entirely inconsistent with the precedents of this Court, the Ninth Circuit's new "end-result" standard is also inimical to the principles of federalism which underlie that "great resistance" to expansion of the substantive content of the Due Process Clause.

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[8] *See, e.g., Quill*, 80 F.3d at 723 (Second Circuit carefully focusing on plaintiffs' argument "for a right to assisted suicide as a fundamental liberty under the substantive component of the Due Process Clause of the Fourteenth Amendment.") and *People v. Kevorkian*, 447 Mich. 436, 464, 527 N.W.2d 714, 724 (1994) (Michigan Supreme Court carefully focusing its inquiry on "whether the [Due Process Clause] encompasses a fundamental right to commit suicide and, if so, whether it includes a right to assistance."), *cert. denied*, 115 S.Ct. 1795 (1995).

2. The Due Process Clause of the Fourteenth Amendment Does Not Encompass A Liberty Interest To Commit Suicide Or To Receive the Assistance of Another to Do So

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law; . . . " U.S. Const. amend. XIV, § 1. Nowhere in the plain language of the Clause is an interest in committing suicide or assisted suicide expressly granted. Nor does the *design* of the Clause support any such contention.[9] The design of the Clause establishes life as the first interest to be accorded substantive and procedural protection, liberty the second, and property the third. The reason for this design is manifest: without life, liberty cannot exist and property cannot be acquired. Any finding of a "liberty interest" to extinguish the life of a "person" inverts the order and is directly contradicted by, and inconsistent with, the design of the Clause itself.[10] Unsupported by the plain language of the Clause and antithetical to its design, there must necessarily be a strong presumption against the contention that such an interest can nevertheless be implied in the substantive content of the Clause itself.[11]

This Court has established the principles to be used by the Judiciary when identifying "rights that have little or no textual

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[9] "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language *or design* of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (emphasis added).

[10] *See* Thomas J. Marzen, *"Out, Out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill*, 21 Hastings Constitutional Law Quarterly, No. 3, (1994) at p. 807. Of course, this conflict was not presented in the abortion context since, under *Roe*, "the word 'person,' as used in the Fourteenth Amendment does not include the unborn. [footnote omitted]." *Roe v. Wade*, 410 U.S. 113, 158 (1973).

[11] Individual interests are not afforded any less protection simply because the government, rather than the individual, is defending them. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 282 n.10 (1990).

support in the constitutional language." *Bowers*, 478 U.S. at 191 (further citation omitted).

> "In *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), it was said that this category includes those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.' A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion by Powell, J.), where they are characterized as those liberties that are 'deeply rooted in this Nation's history and tradition.' [citations omitted]" *Bowers*, 478 U.S. at 191-192.

In approaching an historical analysis to determine whether a particular practice has been accepted by our people, it is important to remember that it is *this* Nation's history and tradition which is dispositive. *Cf. Bowers*, 478 U.S. at 191-194. An analysis, such as that engaged in by the Ninth Circuit in *Compassion in Dying II*, which centers primarily on "ancient attitudes" having little, if any, relevance to America's historical and traditional treatment of suicide and assisted suicide cannot establish that such practices have been accepted by our Nation. *Cf. Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989).

Opposition to suicide is deeply rooted in *this* Nation's history and tradition. "At common law suicide was a felony, punished by forfeiture of property to the king and ignominious burial. Essentially, suicide was considered a form of murder." *In re Joseph G.*, 34 Cal.3d 429, 433, 194 Cal.Rptr. 163, 165 (1983) (citations omitted). While no State has a statute imposing criminal penalties for a successful suicide,

> "abolition of such 'punishments' as ignominious burial for suicide and then the decriminalization of both suicide and attempted suicide did not come about because suicide was deemed a 'human right' or even because it was no longer considered reprehensible. These changes occurred, rather, because punishment was seen as unfair to innocent relatives of the suicide and because those

> who committed or attempted to commit the act were thought to be prompted by mental illness."[12]

In the United States, suicide continues " 'to be considered an expression of mental illness.' "[13] Indeed, the New York State Task Force on Life and the Law found that "[s]tudies that examine the psychological background of individuals who kill themselves show that 95 percent have a diagnosable mental disorder at the time of death."[14] "[A]ll states provide for the involuntary commitment of persons who may harm themselves as the result of mental illness, and a number of states allow the use of nondeadly force to thwart suicide attempts." *People v. Kevorkian*, 447 Mich. 436, 479, 527 N.W.2d 714, 732 (1994) (footnotes omitted), *cert. denied*, 115 S.Ct. 1795 (1995). Simply stated, as Justice Scalia pointed out in his concurring opinion in *Cruzan*, " 'there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' "[15]

Logically, if there is no liberty interest to commit suicide, there can be no liberty interest in receiving the assistance of another to do so. *People v. Kevorkian*, 447 Mich. 436, 468 n.35, 527 N.W.2d 714, 726 n.35 (1994), *cert. denied*, 115 S.Ct. 1795 (1995). However, an independent analysis of the issue provides even more evidence that no such derivative interest exists. At

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[12] Yale Kamisar, *Are Laws against Assisted Suicide Unconstitutional?*, 23 Hastings Center Report, No. 3, 32 (1993) (footnote omitted). See also *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 294-295 (1990) (Scalia, J., concurring).

[13] *In re Joseph G.*, 34 Cal.3d 429, 433, 194 Cal.Rptr. 163, 165 (1983) (citation omitted). *See also, Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1624, 4 Cal.Rptr.2d 59, 64 (1992).

[14] New York State Task Force Report, *When Death is Sought – Assisted Suicide and Euthanasia in the Medical Context* (hereinafter "*New York State Task Force Report*") (May 1994) at 11.

[15] *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 295 (1990) (Scalia, J., concurring) (citation omitted). *See also* Thomas J. Marzen, et al., *Suicide: A Constitutional Right?*, 24 Duq. L. Rev. 1, 100 (1985) (reaching identical conclusion); and *New York State Task Force Report*, at 54-54 and 67-75.

common law, a person who assisted another to commit suicide was guilty of murder. *In re Joseph G.*, 34 Cal.3d 429, 434, 194 Cal.Rptr. 163, 165 (1983).

> "At the time the Fourteenth Amendment was ratified, at least twenty-one of the thirty-seven existing states (including eighteen of the thirty ratifying states) proscribed assisted suicide either by statute or as a common-law offense." *People v. Kevorkian*, 447 Mich. 436, 478, 527 N.W.2d 714, 731 (1994) (citation omitted), *cert. denied*, 115 S.Ct. 1795 (1995).

Today, while a few states continue to classify assisted suicide as murder or manslaughter, "the predominant statutory scheme is to create a sui generis crime of aiding and abetting suicide." *In re Joseph G.*, 34 Cal.3d 429, 434, 194 Cal.Rptr. 163, 165 (1983). At least forty States, Puerto Rico and the Virgin Islands, impose criminal penalties on those who assist another to commit suicide.[16]

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[16] The following states and territories have statutes which impose criminal penalties for aiding, assisting, causing, or promoting suicide: Alaska Stat., § 11.41.120(a)(2); Ariz. Rev. Stat. Ann., § 13-1103(A)(3); Ark. Stat. Ann., § 5-10-104(a)(2); Cal. Pen. Code, § 401; Colo. Rev. Stat., § 18-3-104(1)(b); Conn. Gen. Stat., § 53a-56(a)(2); Del. Code Ann., tit. 11, § 645; Fla. Stat. Ann., § 782.08; Ga. Code Ann. § 16-5-5(b); Ill. Comp. Stat. ch. 720, 5/12-31; Ind. Stat. Ann., § 35-42-1-2.5(b); Iowa Code, §§ 707A.1, 707A.2 and 707A.3, as amended by Acts of the 76th General Assembly, 1996 Session; Kan. Stat. Ann., § 21-3406; Ky. Rev. Stat., § 216:302; La. Rev. Stat., § 14:32.12; Me. Rev. Stat. Ann., tit. 17-A, § 204; Minn. Stat. Ann., § 609.215; Miss. Code Ann., § 97-3-49; Mo. Ann. Stat., § 565.023(1)(2); Mont. Code Ann., § 45-5-105; Neb. Rev. Stat., § 28-307; N.H. Rev. Stat. Ann., § 630:4; N.J. Stat. Ann., § 2C:11-6; N.M. Stat. Ann., § 30-2-4; N.Y. Penal Law, §§ 120.30, 125.15(3); N.D. Cent. Code, § 12.1-16-04; Okla. Stat. Ann., tit. 21, §§ 813-818; 18 Pa. Cons. Stat. Ann., § 2505; P.R. Laws Ann., tit. 33, § 4009; S.D. Codified Laws Ann., § 22-16-37; Tenn. Code Ann., § 39-13-216; Tex. Penal Code Ann., § 22.08; V.I. Code Ann., tit. 14, § 2141; Wash. Rev. Code Ann., § 9A.36.060; and Wis. Stat. Ann., § 940.12. The following states have statutes which impose criminal penalties for negligent homicide which are broad enough to encompass aiding, assisting, causing or promoting suicide: Ala. Code, § 13A-6-1; and Wyo. Stat., § 6-2-107. The following states impose criminal penalties by case law for assisting a suicide: *Commonwealth v. Mink*, 123 Mass. 422, 428-429 (1877); *People v. Kevorkian*, 447 Mich. 436, 493-497, 527 N.W.2d 714, 738-739 (1994), *cert. denied*, 115 S.Ct. 1795 (1995); *Blackburn v. State*, 23 Ohio St. 146, 163 (1872); *State v. Jones*, 86 S.C. 17, 22, 47, 67 S.E. 160, 162, 165 (1910); and *State v. Willis*, 255 N.C. 473, 477, 121 S.E.2d 854, 856-857 (1961).

Against this background, the contention that assisted suicide is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is entirely devoid of merit. *Cf. Bowers v. Hardwick*, 478 U.S. 186, 192-194 (1986).

3. The Ninth Circuit's Reliance on *Casey* and *Cruzan* in Declaring the Existence of New Liberty Interests in Suicide and Assisted Suicide Was Entirely Misplaced

Neither *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), nor *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), support the Ninth Circuit's discovery of new liberty interests to commit suicide and assisted suicide. In *Casey*, the Court was not called upon to decide whether some newly asserted liberty interest to choose an abortion was entitled to constitutional protection. Rather, the primary question presented was whether the fundamental holding of *Roe v. Wade*, 410 U.S. 113 (1973), should be overruled. *Casey*, 505 U.S. at 844-846. Thus, the Court had no reason to discuss, and did not discuss, the well-established principles for construing the substantive content of the Due Process Clause.

Notwithstanding this fact, the Ninth Circuit found *Casey* to be "highly instructive and almost prescriptive for determining what liberty interest may inhere in a terminally ill person's choice to commit suicide." *Compassion in Dying II*, 79 F.3d at 813 (citation and internal quotes omitted). This was error. Contrary to the Ninth Circuit's reasoning, the three sentences in *Casey* it relied upon – broad generalities on the nature of the liberty protected by the Fourteenth Amendment – did not establish a new standard for construing the substantive content of the Due Process Clause. *Compassion in Dying II*, 79 F.3d at 813, *quoting Casey*, 505 U.S. at 851. Moreover, if allowed to stand, the Ninth Circuit's interpretation of these three sentences would virtually eliminate the "guideposts for responsible decisionmaking in this unchartered

area" (*Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)) since many activities which are plainly not entitled to constitutional protection can nevertheless be characterized as "intimate", "personal" or involving "choices central to personal dignity and autonomy".

The Ninth Circuit's reliance on *Casey* was also predicated on the mistaken notion that simply because a decision may involve "choices central to personal dignity and autonomy", one is free to do whatever one wants with one's body. However, this is precisely the sort of "unlimited right to do with one's body as one pleases" which this Court has consistently and soundly rejected. *See Roe v. Wade*, 410 U.S. 113, 154 (1973); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986); and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 (1973), *citing*, *inter alia*, constitutionally unchallenged laws against suicide. The Ninth Circuit's reliance on *Casey* also ignores the fundamental differences between abortion and suicide. This Court has held that abortion does not extinguish the life of a "person" in the context of the Fourteenth Amendment.[17] Certainly, it cannot be denied that suicide does. Under *Roe*, abortion concerns the choice of a woman, the decision-maker, to live her life without the dangers and unwanted conditions associated with pregnancy.[18] Suicide, on the other hand, is about death, *i.e.*, the death of the decision-maker. As Justice O'Connor observed in her opinion in *Casey*, "[a]bortion is a unique act" and "the liberty interest of the woman is at stake in a sense unique to the human condition and so unique to the law." *Casey*, 505 U.S. at 852. It is error to seek to discover new constitutional rights to commit suicide and assisted suicide by analogizing to the unique abortion rights jurisprudence. There is no indication in *Casey*, or the precedent from which it

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[17] *Roe v. Wade*, 410 U.S. 113, 158 (1973) ("the word 'person,' as used in the Fourteenth Amendment, does not include the unborn. [footnote omitted]"). While not a "person", it is of course well-settled that States have "legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child." *Casey*, 505 U.S. at 846.

[18] *Roe v. Wade*, 410 U.S. 113, 153 (1973) (listing factors a woman and her physician would necessarily consider when considering an abortion).

evolved, of an intention to expand the liberty interests previously identified by this Court in the manner utilized by the Ninth Circuit.

Nor does this Court's decision in *Cruzan* support the Ninth Circuit's discovery of new liberty interests to commit suicide and assisted suicide. In *Cruzan*, this Court observed that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Cruzan*, 497 U.S. at 278. Later in the opinion, the Court stated that "*for purposes of this case*, we *assume* that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Cruzan*, 497 U.S. at 279 (emphasis added). Careful examination of this portion of the *Cruzan* opinion reveals two critical points. First, the Court *assumed*, but did not expressly hold, that there is a constitutionally protected interest to refuse life-sustaining medical treatment. Second, this assumption was expressly limited to the *Cruzan* case. Notwithstanding this clear language, the Ninth Circuit read *Cruzan* as "necessarily recogniz[ing] a liberty interest in hastening one's own death." *Compassion in Dying II*, 79 F.3d at 816 (footnote omitted, insert added). Such a reading of *Cruzan* assumes far too much. It is error to attempt to construe *Cruzan's* limited assumption of an interest to refuse medical treatment as acceptance by this Court of a far broader interest to commit suicide and, broader still, assisted suicide. Indeed, the error of such an attempt is plainly evidenced by the majority's recognition in *Cruzan* that, even in the face of a right to refuse medical treatment, the States may properly assert important interests in the protection and preservation of human life, and in the prevention of both suicide and assisted suicide.[19] *Cruzan*, 497 U.S. at 280-282. In summary, suicide and assisted suicide are so significantly different from the refusal of unwanted medical treatment, and its legal underpinnings, that an interest in

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[19] Unlike suicide, "[t]he right to refuse medical treatment meets the 'ordered liberty' and the 'historical underpinnings' tests because it is rooted in the common-law doctrine of informed consent, which embodies the notion of bodily integrity." *People v. Kevorkian*, 447 Mich. 436, 480 n.59, 527 N.W.2d 714, 732 n.59 (1994), *cert. denied*, 115 S.Ct. 1795 (1995).

committing suicide or assisted suicide simply cannot be inferred from *Cruzan*.

4. Relevant State Interests Clearly Outweigh the Alleged Liberty Interests in Suicide and Assisted Suicide

In order to determine whether Washington's prohibition of assisted suicide violates the Due Process Clause, the asserted interests in suicide and assisted suicide must be balanced against relevant state interests.[20] *Cruzan*, 497 U.S. at 261. The wide range of circumstances within which these newly discovered interests to commit suicide and assisted suicide could be exercised implicate several important state interests, including, but not limited to: (1) the protection and preservation of human life;[21] (2) the prevention of suicide;[22] (3) preventing the fraud, errors and abuse which

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[20] Since respondents have not even attempted to demonstrate that there is no set of circumstances under which Washington's prohibition of assisted suicide would be valid, their facial challenge to the statute must necessarily fail under *United States v. Salerno*, 481 U.S. 739, 745 (1987). The district court characterized respondents' challenge to Washington's statute as "facial". *Compassion in Dying v. State of Washington*, 850 F.Supp. 1454, 1459 (W.D. Wash. 1994). Upon review, a majority of the three-judge panel found the district court's facial invalidation of the statute to be "wholly unwarranted" under both *Salerno* and *Casey*. *Compassion in Dying I*, 49 F.3d 586, 591 (9th Cir. 1995), *superseded by* 79 F.3d 790 (9th Cir. 1996). However, the *en banc* panel held respondents' challenge to be "as-applied", declaring that "[s]ince the claimed liberty issue in this case is in many respects similar to the liberty issue involved in *Casey*, . . . we believe that the *Salerno* test would not in any event be the appropriate one for adjudicating a facial challenge to Washington's prohibition on assisted suicide." *Compassion in Dying II*, 79 F.3d 790, 798 n.9 (9th Cir. 1996). Certiorari should be granted to decide whether the *Salerno* test applies outside the abortion context to what the amici States maintain is a facial challenge to Washington's statutory prohibition of assisted suicide.

[21] *Cruzan*, 497 U.S. at 280.

[22] "Suicide is the eighth leading cause of death in the United States." *New York State Task Force Report*, at 9 (footnote omitted). "Studies that examine the psychological background of individuals who kill themselves show that 95 percent have a diagnosable mental disorder at the time of death." *Id.*, at 11. Furthermore, "[l]ike other suicidal individuals, patients who desire suicide or an early death during a terminal illness are usually suffering from a treatable mental illness, most commonly depression." *Id.*, at 13 (footnote omitted).

would accompany acceptance of suicide and assisted suicide;[23] (4) maintaining the ethical integrity of the medical profession;[24] (5) protecting the poor and minorities from exploitation;[25] (6) protecting handicapped persons from societal indifference;[26] and (7) protecting innocent third parties.[27]

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[23] *Cruzan*, 497 U.S. at 281 ("[E]ven where family members are present, [t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient. A State is entitled to guard against potential abuses in such situations. [citation omitted, internal quotes omitted]"). *See also Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1623, 4 Cal.Rptr. 59, 64 (1992) ("The state's interest must prevail over the individual because of the difficulty, if not the impossibility, of evaluating the motives of the assister or determining the presence of undue influence."), and *Donaldson*, 2 Cal.App.4th at 1624 ("Third parties, even family members, do not always act to protect the person whose life will end.").

[24] *Cf. Middlesex Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 434 (1982) (important state interest in "maintaining and assuring the professional conduct of professional attorneys it licenses"). *See also Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1620, 4 Cal.Rptr.2d 59, 62 (1992) (recognizing state interest in maintaining the ethical integrity of the medical profession). In reaffirming its long-standing opposition to physician assisted suicide, the American Medical Association has declared that physician-assisted suicide "threatens the very core of the medical profession's ethical integrity" and is "fundamentally inconsistent with the physician's professional role." American Medical Association, Council on Ethical and Judicial Affairs, *Code of Medical Ethics Reports*, Vol. V, No. 2 (July 1994), Report 59, *Physician-Assisted Suicide*, 269 and 274, respectively.

[25] *Quill*, 80 F.3d at 730, *citing Compassion in Dying I*, 49 F.3d 586, 592 (9th Cir. 1995), *superseded by* 79 F.3d 790 (9th Cir. 1996).

[26] *Quill*, 80 F.3d at 730, *citing Compassion in Dying I*, 49 F.3d 586, 592-593 (9th Cir. 1995), *superseded by* 79 F.3d 790 (9th Cir. 1996).

[27] *Application of President & Directors of Georgetown College, Inc.*, 118 U.S.App.D.C. 80, 331 F.2d 1000, 1008 (1964), *cert. denied*, 377 U.S.

While the Ninth Circuit acknowledged, at least to some extent, some of these interests, its application of the balancing test was fundamentally flawed by the improper insertion of quality-of-life considerations which it used to discount the strength of various important state interests.[28] Such quality-of-life considerations are directly contrary to this Court's holding in *Cruzan* that "a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." *Cruzan*, 497 U.S. at 282.

Moreover, the dangers inherent in using such quality-of-life considerations are well-recognized. "Were quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives." *Cruzan v. Harmon*, 760 S.W.2d 408, 422 (Mo. banc 1988), *aff'd sub nom. Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). Such an analysis also disregards the irrefutable principle that all lives, from beginning to end and irrespective of physical or mental condition, are under the full protection of the law. *Cruzan*, 497 U.S. at 295 (Scalia, J., concurring), citing *Blackburn v. State*, 23 Ohio St. 146, 163 (1873). Properly weighed, without the insertion of improper quality-of-life considerations, the States' interests, individually and collectively,

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978 (1964). *See also Bartling v. Superior Court*, 163 Cal.App.3d 186, 195 n.6, 209 Cal.Rptr. 220, 225 n.6 (1984).

[28] *Compassion in Dying II*, 79 F.3d at 817 (strength of the state's important interest in the preservation of human life "is dependent on relevant circumstances, including the medical condition and the wishes of the patient whose life is at stake."); *Id.*, at 820 (state interest in preventing suicide, "like the state's interest in preserving life, is substantially diminished in the case of terminally ill, competent adults who wish to die. [footnote omitted]"); *Id.*, at 825 (state interest in preventing involvement of third persons at a minimum "when the assistance is provided by or under the supervision or direction of a doctor and the recipient is a terminally ill patient."); and *Id.*, at 827 (state interest in protecting innocent third parties "is of almost negligible weight when the patient is terminally ill and his death is imminent and inevitable.").

clearly outweigh any individual interests in committing suicide and assisted suicide.

B. Certiorari Should be Granted to Reaffirm the States' Essential Role in our Federal System of Government and the Power of the People to Directly Govern Their Own Affairs

With the ever-increasing power of medical science to prolong life, even in the face of what would otherwise be terminal illness, the States have had to strike a balance between the rights of the individual and the demands of organized society. That balance is grounded in the States' recognition of their responsibility to protect both individual rights and, at the same time, the lives of those who wish to live-no matter what their circumstances. In striking that balance, the States have drawn a line between an individual's "right to be let alone",[29] on the one hand, and intentionally killing oneself, with or without assistance, on the other. That balance, now a national consensus, is represented by statutes in a majority of states which codify an individual's right to refuse unwanted medical treatment and, in the same legislation, reject any affirmative act to end life. Whether that balance should be abandoned and the line redrawn to permit an individual to commit suicide without state interference, and then redrawn yet again to permit assisted suicide, is a matter appropriately left for the people to decide, through their duly elected representatives or by initiative ballot.[30] The principles of federalism embodied in our Constitution require no less.

As the States continue to grapple with the difficult questions presented by the ever-increasing ability of medical technology to prolong life, the corresponding need to allow the States to serve as

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[29] *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347, 352-353 (1967).

[30] *See People v. Kevorkian*, 447 Mich. 436, 481-482, 527 N.W.2d 714, 733 (1994), *cert. denied*, 115 S.Ct. 1795 (1995), and *Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1623, 4 Cal.Rptr.2d 59, 64 (1992). *See also, Cruzan v. Harmon*, 760 S.W.2d 408, 426 (Mo. banc 1988) ("Broad policy questions bearing on life and death issues are more properly addressed by representative assemblies."), *aff'd sub nom. Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

laboratories for change becomes paramount. Indeed, as this Court has recognized, "[t]he science of government . . . is the science of experiment, . . . " *Garcia v. San Antonio Metro.*, 469 U.S. 528, 546 (1985) (citation and internal quotes omitted). However, if allowed to stand, the Ninth Circuit's opinion will effectively extinguish the power of the States to continue to serve as laboratories for change on an issue that arguably will affect more lives than any issue the States will face in the foreseeable future. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). It will also "invite[ ] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia v. San Antonio Metro.*, 469 U.S. 528, 546 (1985). At the same time, it will "relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy." *Garcia*, 469 U.S. at 575 (Powell, J., dissenting) (footnote omitted).

> "The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary." *Compassion in Dying II*, 79 F.3d 790, 858 (9th Cir. 1996) (Kleinfeld, C.J., dissenting).

III. CONCLUSION

For all the foregoing reasons, amici States respectfully request that the Court grant certiorari in this case.

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